

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SHONDOR MONTEZ LOVE,

Defendant-Appellee.

UNPUBLISHED

May 17, 2005

No. 252360

Wayne Circuit Court

LC No. 03-006081-01

Before: Murphy, P.J., and White and Smolenski, JJ.

PER CURIAM.

The prosecutor appeals as of right from an order dismissing criminal charges against defendant. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Preliminary examination testimony established that police officers attempted to pull defendant over for failing to signal a turn on April 4, 2003, but that defendant left his vehicle and ran from police. When the officers caught up to defendant, he discarded a baggie containing a substance later identified as cocaine. Defendant was then arrested.

Following defendant's preliminary examination, defendant moved to have the charges against him dismissed claiming that the police department violated his right to due process when it failed to provide him with a copy of the squad car's videotape of the events leading up to his arrest. Defendant claimed that the tape would show that the police officers' assertion that they tried to pull defendant over because he failed to properly signal a turn was a pretext. Defendant also claimed that the officers maneuvered the squad car over to the place where he was eventually apprehended and, therefore, the tape might have shown that he did not discard the baggie of cocaine.

An evidentiary hearing was held regarding the failure to produce the tape. At the hearing, testimony established that the police would recycle or tape-over a tape every sixty days unless told to hold it. Testimony also established that the police department's policies for logging tapes was not properly followed with respect to the squad car in question. Furthermore, the procedures for holding a tape were not properly followed, and as a result, defendant's request was not processed until after the tape would already have been recycled. There was also testimony that, contrary to police policy, the squad car might not have had a tape in its recorder on the day of defendant's arrest.

At the close of the evidentiary hearing, the trial court found that the police department's failure to follow its own policies had amounted to bad faith. The court explained,

It is not negligent. It goes beyond negligence. It goes to malfeasance, not misfeasance. It is intentional. It is repetitive. It has come to a point that no one is concerned. It is acceptable that we are not doing what we are supposed to be doing.

This Court finds that to be bad faith. Failing to follow the procedure to make sure that what is done is being done is going through the back door to get what you can't get going in the front door. Because if the tape was there and you destroyed it, and you did so intentionally because you didn't want it out there, that's bad faith. But to take action through your inaction to make sure that there's no consistency in the availability of what is mandatorily supposed to be there in the first place, it's the same thing. Bad faith.

The trial court then dismissed the charges against defendant and plaintiff appealed.

This Court reviews a trial court's decision to grant or deny a motion to dismiss charges for an abuse of discretion. *People v Kevorkian*, 248 Mich App 373, 383; 639 NW2d 291 (2001). However, de novo review is appropriate for the legal questions that underlie the trial court's ruling on the motion to dismiss. *Id.*

The suppression of evidence favorable to an accused violates due process where the evidence is material to guilt irrespective of the good faith or bad faith of the prosecution. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). The prosecution also has a duty to preserve material evidence, but to be material the evidence "must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *California v Trombetta*, 467 US 479, 488-489; 104 S Ct 2528; 81 L Ed 2d 413 (1984). The failure to preserve evidence of which no more can be said than that it might have been exculpatory will not rise to a due process violation unless the evidence was destroyed in bad faith. *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988). The defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

In its opinion dismissing the charges, the trial court focused on the police department's failure to adhere to its own policies governing the use of videotapes in police cruisers, but never addressed whether an actual tape existed. While testimony at the evidentiary hearing established that it was the police department's policy to have tapes in each squad car, there was no evidence that an actual tape of the events leading to defendant's arrest existed. Indeed, there was evidence tending to demonstrate that no tape existed for the day in question. Hence, defendant failed to establish the existence of the evidence on which he based his motion for dismissal. The police department cannot intentionally destroy that which does not exist nor can it be required to preserve a non-existent tape. Furthermore, there is no constitutional obligation on the part of the police to utilize a particular investigatory tool, such as a video recorder. *Youngblood*, *supra* at 59. Consequently, the police department's failure to place a tape in the recorder cannot constitute a due process violation.

Likewise, even if one were to assume that the tape actually existed, defendant failed to demonstrate that the tape contained exculpatory evidence. See *Johnson, supra* at 365 (noting defendant failed to present any evidence that radio traffic would have been exculpatory). Absent proof of exculpatory evidence, defendant must demonstrate that the police destroyed the evidence in bad faith. *People v Leigh*, 182 Mich App 96, 98; 451 NW2d 512 (1989). This requirement exists “both [to] limit[] the extent of the police’s obligation to preserve evidence to reasonable bounds and confine[] it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant.” *Youngblood, supra* at 58. Nothing in the police conduct described at the evidentiary hearing indicates that the destruction of the evidence, if it existed at all, was motivated by bad faith. At best, the testimony indicates that the police department was negligent in following its own policies.

Because defendant failed to demonstrate that an actual tape of the events leading to his arrest existed and failed to demonstrate that, even if such a tape did exist, it contained exculpatory evidence or was destroyed in bad faith, we cannot but conclude that the trial court abused its discretion when it dismissed defendant’s charges. We therefore reverse the trial court’s decision to dismiss the charges and remand this case for further proceedings consistent with this opinion.

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Michael R. Smolenski